Supreme Court, U.S.
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No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: May 15, 2000
CERTIORARI GRANTED: April 26, 2001

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 96-CV-2739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET ENTRY
9/9/96	1	COMPLAINT; with jury demand
		* * * * *
9/9/96	2	Answers to 16B Interrogatories by plaintiff EEOC
		* * * * *
9/9/96	4	AFFIDAVIT of David R. Treeter by plaintiff EEOC
		* * * * *

DATE	DOCKET NUMBER	DOCKET ENTRY
12/2/96	10	MOTION by defendant Waffle House Inc to dismiss, and to compel arbitration and stay proceedings
12/2/96	11	MEMORANDUM by defendant Waffle House Inc in support of [10- 1] motion to dismiss
		* * * * *
12/22/96	13	MEMORANDUM by plaintiff EEOC in opposition to [10-1] motion to dismiss, [10-2] motion to compel arbitration and stay proceedings
12/22/96	14	AFFIDAVIT of Eric Scott Baker by plaintiff EEOC
12/22/96	15	AFFIDAVIT of Joseph P. Doherty by plaintiff EEOC
		* * * * *
1/13/97	20	REPLY by defendant Waffle House Inc to response to [10-1] motion to dismiss, [10-2] motion to compel arbitration and stay proceedings

DATE	DOCKET NUMBER	DOCKET ENTRY
2/18/97	21	Answers to 16B Interrogatories by defendant Waffle House Inc (ttil)
		* * * * *
5/9/97	23	REPORT AND RECOMMENDATIONS of Magistrate Judge Joseph R. McCrorey recommending that defendants motion to dismiss be denied and the petition to compel arbitration and stay proceedings be granted.
		* * * * *
5/23/97	24	OBJECTION by plaintiff EEOC to [23-1] report and recommendations
6/9/97	25	MEMORANDUM OF LAW by defendant Waffle House Inc in response to [24-1] objections to the magistrate's report and recommendation
6/19/97	26	SUPPLEMENTAL MEMORANDUM OF LAW by defendant Waffle House Inc to [24-1] objections to report and recommendation

DATE	DOCKET NUMBER	DOCKET ENTRY
3/23/98	27	ORDER denying [10-1] motion to dismiss, denying [10-2] motion to compel arbitration and stay proceedings
		* * * * *
3/31/98	29	NOTICE OF INTERLOCUTORY APPEAL by defendant Waffle House Inc from the order denying its motion to compel arbitration and for a stay under section 3 and 4 of the Federal Arbitration Act entered on March 24, 1998

* * * * *

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED,
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET ENTRY
4/7/98	Civil case docketed.
4/8/98	Docketing notice issued.
	* * * * *
3/1/99	Oral argument heard.
	* * * * *
10/6/99	Published, authored opinion filed.
10/6/99	Judgment order filed. Decision: affirmed in part, reversed in part and remanded. There is a dissenting opinion.

DATE	DOCKET ENTRY
	* * * * *
11/18/99	Petition filed by Appellee EEOC for rehearing.
	* * * * *
1/14/00	COURT ORDER filed denying motion for rehearing, denying motion for rehearing en banc.
	* * * * *
1/24/00	Mandate issued.

* * * * *

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED, DEFENDANT-APPELLANT

Argued March 1, 1999
Decided Oct. 6, 1999

Before: NIEMEYER and KING, Circuit Judges, and LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LEE joined. Judge KING wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents the question of first impression in this circuit whether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer. Other circuits are split on the proper response to this question. Compare *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that an arbitration agreement between a

charging party and an employer precludes the EEOC from seeking purely monetary relief in federal court on behalf of the charging party but not from seeking broad injunctive relief), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that a private arbitration agreement does not affect the scope of the EEOC's federal court suit at all).

Recognizing that the EEOC is vested with enforcement authority both to seek broad-based injunctive relief in the public interest and to seek "make-whole" relief on behalf of a charging party, we conclude (1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. Accordingly, we affirm the district court's decision to deny Waffle House's petition to compel arbitration generally and remand to the district court for consideration of the EEOC's claims in light of this opinion.

I

On June 23, 1994, Eric Baker, who was seeking employment, entered the Waffle House facility located at exit 113 of Interstate 26 in Columbia, South Carolina, and proceeded to fill out and sign an application for employment with Waffle House, Inc. He left blank the space on the application asking what position he sought. The application included a provision requiring the applicant to submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of

Waffle House, Inc., or the terms, conditions or benefits of such employment." Although the manager at that Waffle House facility, Lee Motlow, asked Baker whether he wanted the job there, Baker declined and instead, called the manager of a nearby Waffle House facility located at exit 110 of Interstate 26 in West Columbia, to whom Motlow had referred Baker.[1] The West Columbia Waffle House manager interviewed Baker and hired him to begin work two weeks later. Baker did not fill in another application and began work in the West Columbia facility on August 10, 1994, as a grill operator.

At his home, approximately two weeks later, Baker suffered a seizure, ostensibly caused by a change in the medication he was taking to control a seizure disorder that had developed as a result of a 1992 automobile accident. The next day, just after arriving for work, Baker suffered another seizure. Waffle House discharged Baker on September 5, 1994, stating in the separation notice that "We decided that for [Baker's] benefit and safety and Waffle House it would be best he not work any more."

Baker filed a charge with the EEOC, complaining that his discharge violated the Americans With Dis-

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[1] In its answers to interrogatories, the EEOC stated more particularly: "Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow had referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit # 446 in West Columbia. Baker visited Unit # 446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later." J.A. at 13.

abilities Act of 1990 ("ADA"), and on September 9, 1996, the EEOC filed this enforcement action in its own name against Waffle House pursuant to § 107(a) of the ADA, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, alleging that Waffle House had engaged in "unlawful employment practices at its West Columbia, South Carolina, facility." The EEOC stated in its complaint that its purpose for filing the suit was "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." It sought as relief (1) a permanent injunction barring Waffle House from engaging in employment practices that discriminate on the basis of disability; (2) an order that Waffle House institute and carry out antidiscrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) backpay and reinstatement for Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by Baker; and (5) punitive damages.

In response to the complaint, Waffle House filed a petition under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to compel arbitration and to stay the litigation and, alternatively, to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The motion was referred to a magistrate judge who—relying on the undisputed record consisting of the complaint, answers to interrogatories, and affidavits filed in connection with the motion to compel arbitration—recommended to the district court that it conclude that Baker had entered into an arbitration agreement with Waffle House and that the EEOC was required to arbitrate the claims it filed on behalf of Baker. The district court,

relying on the facts "extrapolated from the pleadings," disagreed with the magistrate judge's recommendations and denied each of Waffle House's motions, concluding that the arbitration provision contained in Baker's employment application was inapplicable because the West Columbia Waffle House facility, which ultimately hired Baker, had not hired him pursuant to his earlier application submitted at the Columbia Waffle House facility.

Waffle House filed this interlocutory appeal challenging the district court's denial of its petition to compel arbitration and to stay proceedings. *See* 9 U.S.C. § 16(a)(1). On appeal, it argues that (1) contrary to the district court's holding, a valid, enforceable arbitration agreement existed between Baker and Waffle House and (2) its motion to compel arbitration under § 4 of the FAA should be granted because the arbitration agreement between Baker and Waffle House binds the EEOC to "assert Baker's claim in an arbitral forum."

II

Because arbitration is a matter of contract, we must first determine whether an enforceable arbitration agreement governed Baker's employment with Waffle House. *See Johnson* v. *Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998). The district court concluded that the arbitration agreement in Baker's employment application did not govern his employment relationship with Waffle House because it was submitted to the Waffle House facility at exit 113 of Interstate 26 in Columbia, and Baker was not ultimately employed at that facility. When Baker later went to the Waffle House facility at exit 110 of Interstate 26 in West Columbia, he was given a job there without sub-

mitting another application. The court thus concluded, "it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate."

We disagree with the district court's analysis because it assumes that the two Waffle House facilities were legally distinct entities in this context. The employment application Baker completed was the standard form application for employment with the corporation Waffle House, Inc., and not with an individual Waffle House facility. Indeed, the manager at the Columbia Waffle House facility referred Baker to the manager at the West Columbia Waffle House facility. In filling out the application, Baker left blank the space provided on the form for listing specific positions applied for, and he specified no intent to limit the application to a particular location. Moreover, when Baker did begin work at the West Columbia facility, he did not fill out another application. It cannot be assumed that a national corporation like Waffle House hired an individual without gathering any of the requisite information, such as his proper name, address, social security number, age and other personal data, qualifications, and references, all of which were contained in the application Baker originally submitted at the Waffle House facility in Columbia.

Accordingly, the fact that Baker was ultimately employed at a different facility than the one at which he was physically present when he completed the application is immaterial to the applicability of the arbitration agreement. The generic, corporation-wide employment application completed and signed by Baker, and the

arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him. We thus conclude that Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House.

Having reached that conclusion, however, we must still determine what effect, if any, the binding arbitration agreement between Baker and Waffle House has on the EEOC, which filed this action in its own name both in the public interest and on behalf of Baker.

III

In its motion to compel arbitration, Waffle House sought "to enforce the arbitration agreement between Waffle House and Baker and compel the EEOC, on behalf of Baker, to submit Baker's employment related dispute with Waffle House to arbitration." On appeal, it continues to maintain that "[i]t is of no consequence under the FAA that the EEOC is bringing this action on behalf of Baker rather than Baker bringing this action directly" because the EEOC is "bound by Baker's arbitration agreement with Waffle House." The EEOC characterizes Waffle House's argument as "an astounding proposition." It argues that not only did it "never agree[ ] to arbitrate its statutory claim," but also that the EEOC "has independent statutory authority to bring suit in any federal district court where venue is proper." We agree with the EEOC.

In enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to "advance the public interest in preventing and remedying employment discrimination." *General Tel. Co. of the Northwest, Inc.* v. *EEOC*,

446 U.S. 318, 331, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980). The EEOC's independent authority to enforce the ADA is clear.

In enacting the ADA, Congress chose to incorporate the enforcement "powers, remedies, and procedures" of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. §§ 2000e-4, -5, -6, -8, -9). These Title VII mechanisms vest the EEOC with broad authority to enforce, in federal court, the statute's ban on disability-based discrimination. *See* 42 U.S.C. § 2000e-5(f)(1), (f)(3). Under Title VII as originally enacted, the EEOC's powers were limited to investigation and conciliation, and Congress relied exclusively on private parties' suits for enforcement. In 1972, however, seeking to remedy widespread noncompliance under this enforcement system, Congress amended Title VII, according the EEOC the right to file suit in federal court in its own name to eradicate discriminatory employment practices. *See General Tel.*, 446 U.S. at 325-26, 100 S. Ct. 1698. Although the amendments created a dual system of private and government enforcement, we have long recognized that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976) (internal quotation marks and citation omitted).

Because of this public mission, the EEOC cannot be viewed as merely an institutional surrogate for individual victims of discrimination. *See General Tel.*, 446 U.S. at 326, 100 S. Ct. 1698 (holding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23"). "[U]nlike the individual charging party, the EEOC [sues] 'to vindicate the public interest' as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party." *General Elec.*, 532 F.2d at 373 (quoting *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)); *see also EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (concluding that because the EEOC's "interests are broader than those of the individuals injured by discrimination . . . private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes" (citations omitted)); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (observing that "[p]rivate litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC" (citations omitted)); *EEOC* v. *United Parcel Serv.*, 860 F.2d 372 (10th Cir. 1988); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

The statutory structure of Title VII's enforcement remedies (and therefore those of the ADA) reflects the notion that the scope of the public interest exceeds that of the individual's interest. In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis* v. *North*

Carolina Dep't of Correction, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is then limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). In a similar vein, when a private individual brings suit, the court may, under certain circumstances, permit the EEOC to intervene to protect the national interest. *See id.* In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331, 100 S.Ct. 1698; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10.

Even while empowering the EEOC to sue on a charge independently, Congress preserved the individual's private remedies under Title VII, indicating that private suits are still appropriate to redress individuals' grievances. And even when the EEOC has determined to bring suit in its own name, the charging party retains "the right to intervene in a civil action brought by the Commission" if the individual believes that the EEOC will not adequately represent his interests as it pursues its public objectives. *See* 42 U.S.C. § 2000e-5(f)(1); *compare* 29 U.S.C. § 626(c)(1) (terminating an individual's right to sue under the ADEA upon the EEOC's commencement of an action to enforce that individual's

rights).[2] Congress anticipated that the EEOC would not always be able to achieve the best possible result for each individual while at the same time pursuing its mission to vindicate the public interest. *See General Tel.*, 446 U.S. at 331, 100 S. Ct. 1698 (noting that the EEOC "is authorized to . . . obtain the most satisfactory overall relief even though competing interests are involved" and that it must make "the hard choices where conflicts of interest exist").

In short, under the 1972 amendments to Title VII, which are incorporated into the ADA, Congress has created a dual enforcement system, reflecting the notion that the EEOC and the charging party are not interchangeable plaintiffs. Each has its own distinct, albeit overlapping, interests for which overlapping remedies are provided. Thus, in pursuing the inquiry into whether the EEOC can be compelled to arbitrate on the basis of an arbitration agreement binding the charging party, we do not take the EEOC as a surrogate for the charging party, subrogated to his interest. Rather, we examine the related, but independent, interests of both the EEOC and the charging party to determine how an arbitration agreement signed by the charging party affects the prosecution of a claim by the EEOC.

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[2] In concluding that this "distinctive enforcement scheme of the ADEA" illustrates the EEOC's "representative responsibilities when it initiates litigation to enforce an employee's rights," the Third Circuit expressly noted that the enforcement scheme of Title VII "from which the framers of the ADEA consciously departed . . . has no similar feature." *U.S. Steel*, 921 F.2d at 494 & n.4.

First, we must recognize that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate. On the contrary, as demonstrated above, the 1972 amendments to Title VII clearly show that Congress intended that the EEOC vindicate the public interest by conciliation and then by suit in federal court. We must also recognize that in this case the EEOC is not a party to any arbitration agreement. *See AT & T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986); *Arrants* v. *Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (explaining that "[e]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate" (citation omitted)). Thus, the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest. This argument, however, disregards the EEOC's independent statutory role as we have outlined it.

In addition, contrary to Waffle House's claims, neither of the other two circuits that have addressed the question of the impact of a private arbitration agreement on the EEOC's ability to sue in its own name have concluded that such an agreement permits a court to force the EEOC into arbitration under the FAA. *See Frank's Nursery*, 177 F.3d at 462 (observing that "courts may not treat the agreement of a private party to arbitrate her action as the agreement of the EEOC to arbitrate its action"); *Kidder, Peabody*, 156 F.3d at 301-02 (upholding the district court's grant of the employer's motion to dismiss the EEOC's ADEA suit seeking solely monetary damages but not addressing the issue of compelling the EEOC to arbitrate because the employer did not seek to do so).

Moreover, the Supreme Court has recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that an employee's private arbitration agreement with her employer precluded *her* from filing suit against the employer under the ADEA). Although a private arbitration agreement does bar an individual ADEA claimant from asserting her claim in court, it does *not* prevent her from filing a charge with the EEOC. *See id.* at 28, 111 S. Ct. 1647. This rule demonstrates the Court's recognition that the EEOC's suit can accomplish aims—namely, combating discrimination on a societal level—that an individual's suit is not equipped, nor perhaps intended, to accomplish. The court also emphasized, in refuting the argument that enforcing arbitration agreements would undercut the statutory scheme, that "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." *Id.* at 32, 111 S. Ct. 1647. Thus, it is apparent that the Court did not intend that when an individual who is subject to an arbitration agreement files a charge, the EEOC can only pursue relief in an arbitral forum. To the contrary, the Court appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*.

Accordingly, we conclude that Waffle House cannot succeed on its motion to compel the EEOC to arbitrate.

IV

While we have thus observed that the important role of the EEOC in vindicating the public interest in preventing and eradicating workplace discrimination is not to be restricted by arbitration agreements to which it is not a party, its role in vindicating in federal court the individual interests of the charging party implicates the competing federal policy favoring the enforcement of arbitration agreements.

When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. *See* 9 U.S.C. § 2; *Moses H. Cone Mem'l. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). To permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, *see Gilmer*, 500 U.S. at 28, 111 S. Ct. 1647, but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, *cf. Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

Recognizing these competing policies, we agree with the balance struck by the Second Circuit, which held that although the EEOC "may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," it may not pursue relief in court—in that case, monetary relief—specific to individuals who have waived their right to a judicial forum by signing an arbitration agreement. *Kidder, Peabody*, 156 F.3d at 302-03; *but see Frank's Nursery*, 177 F.3d at 459-67 (holding that neither the FAA nor principles of preclusion or waiver could operate to bar the EEOC from seeking monetary relief on behalf of aggrieved individuals). When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Thus, we hold that to the extent that the EEOC seeks "a permanent injunction enjoining [Waffle House] from discharging individuals and engaging in any other employment practice which discriminates on the basis

of disability" and an order to Waffle House "to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices," the EEOC is pursuing the public interest in a discrimination-free workplace, and it must be allowed to do so in federal court, as authorized by the ADA, notwithstanding the charging party's agreement to arbitrate. In seeking to "vindicate rights belonging to the United States as sovereign," *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (internal quotation marks and citation omitted), which are not necessarily identical to the interests of the individual charging party, the EEOC's course of conduct should not be affected by the actions of an individual in entering into a private arbitration agreement. *See* Part III, *supra*. In similar contexts where charging parties have been deprived of their right to sue either by settling their claims or having their claims dismissed, courts have nevertheless permitted the EEOC to maintain a suit for injunctive relief. *See, e.g.*, *EEOC* v. *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (noting that "there would be little point in [the EEOC] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant"); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291-92 (7th Cir. 1993); *Goodyear Aerospace*, 813 F.2d at 1542-45.

Conversely, however, in these same contexts some of the same courts have recognized that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on behalf of the charging

party. *See, e.g.*, *Goodyear Aerospace*, 813 F.2d at 1543 (holding that the charging party's acceptance of a personal settlement of her claims rendered moot the EEOC's claims for backpay on her behalf); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (holding that the doctrine of *res judicata* barred the EEOC from seeking "individualized benefits" under the ADEA on behalf of individuals whose own suits were unsuccessful because the EEOC was "in privity" with those individuals); *Harris Chernin*, 10 F.3d at 1291 (following *U.S. Steel's* reasoning with regard to the EEOC's claim for backpay, liquidated damages, and reinstatement for an individual whose suit was dismissed as barred by the statute of limitations).

Similarly, we also hold that when the EEOC enforces the individual rights of Baker by seeking backpay, reinstatement, and compensatory and punitive damages, it must recognize Baker's prior agreement to adjudicate those rights in the arbitral forum. Because the EEOC maintains that it "has no intention" of pursuing a claim in arbitration, we do not reach the question of whether the EEOC is *authorized* to do so. But it cannot pursue Baker's individual remedies in court, although it may seek broad injunctive relief in its public enforcement role.

Accordingly, we affirm the district court's order to the extent that it denied Waffle House's motions to compel the EEOC to arbitrate and to dismiss this action. We reverse its ruling that the EEOC may prosecute Baker's individual claims in court. And we remand with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted

on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief.[3]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

KING, Circuit Judge, dissenting:

Because I agree with the district court that there was no agreement to arbitrate in this case, I must respectfully dissent. I would, therefore, without reaching the issue of the authority of the EEOC to seek injunctive and "make-whole" relief for Mr. Baker on his ADA claim, simply affirm the decision of the district court.

I.

On June 23, 1994, Mr. Baker completed an employment application at a Waffle House restaurant in Columbia, South Carolina ("Columbia Waffle House" or "CWH").[1] The district court found that the manager of

[3] Waffle House argues that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker. We leave to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks. *See* 42 U.S.C. § 2000e-5(g)(1).

[1] The employment application completed by Mr. Baker contains a mandatory arbitration provision, which is comprised of four lines of single-spaced text located at the bottom of the first page of a two-page application. It states in full:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

This provision, printed in seven-point font, occupies merely 5/16 of an inch of a page that is eleven inches long. No other clause in the employment application is printed in as small a font size.

the CWH offered Mr. Baker a job on that occasion, which Mr. Baker did not accept.

Approximately three weeks later, Mr. Baker traveled to a different Waffle House restaurant, one located in West Columbia, South Carolina ("West Columbia Waffle House" or "WCWH"), where, the district court found, Mr. Baker "orally applied for a job and was orally given a job which he accepted." J.A. 137. Mr. Baker did not execute a written employment application at the WCWH. Indeed, there is no evidence that the terms of the employment application that Mr. Baker completed at the CWH were discussed or adopted by Mr. Baker and Mike Bradley, the WCWH manager who hired Mr. Baker. Since there was no evidence on the point, the district court found that it did not appear that the "management [of WCWH] knew of or had the benefit of the application form which Baker had previously signed." J.A. 137-38.

The district court made no findings connecting the WCWH offer to the CWH offer that Baker had rejected.[2] Further, the district court's affirmative rejection of the magistrate judge's findings, *see supra* note 2, is, in itself, a factual finding that requires our deference. The district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside [on appeal] unless clearly erroneous." Fed.R.Civ.P. 52(a). Findings of fact may be overturned only if we are "left with the definite and firm conviction

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[2] In its written opinion of March 20, 1998, from which this appeal is taken, the district court found and concluded as follows:

> [T]his Court *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon by the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions.

J.A. 137-38. Significantly, the district court expressly rejected the magistrate judge's conclusion that Baker "appear[ed] to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration," by Baker's subsequent acceptance of employment at the WCWH.

that a mistake has been committed." *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).[3] The majority wrongly implies that an appellate court may consider and adopt facts found by a magistrate judge—facts already expressly rejected by the district court—without finding such facts to be clearly erroneous.[4]

Based on its factual findings, the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that he ultimately accepted—the position of grill operator at the West Columbia Waffle House. Consequently, the district court denied Waffle House's motion to compel arbitration and its motion to dismiss.

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[3] *See also* Fed.R.Civ.P. 52 advisory committee's note (1985) (public interest recognizes the trial court, not the appellate tribunal, as the fact-finder, to promote stability and judicial economy). When a court of appeals actively engages in the fact-finding function, it undermines the legitimacy of the district courts. *Id.*

[4] While the majority asserts that the EEOC interrogatory answers support its factual scenario, *see ante* p. [3a] note 1, these answers are legally irrelevant for at least three reasons: (1) they are invalid because they were not made under oath (as required by Rule 33(b) of the Federal Rules of Civil Procedure); (2) they are signed by counsel only (not by Baker, who had the requisite personal knowledge); and (3) their evidentiary value was repudiated by the EEOC at oral argument. *Bracey* v. *Grenoble*, 494 F.2d 566, 570 n. 7 (3rd Cir. 1974). Accordingly, these answers could not and cannot be properly relied on in this case. *See id.* Most importantly, subsequently filed affidavits (properly sworn) do not contain the information relied upon by the majority, *see* J.A. 12, 28, and that information is contrary to the findings of the district court. *See supra* note 2. As I have noted, the majority has not determined the factual findings of the district court to be clearly erroneous.

The district court's findings of fact are not clearly erroneous, and its conclusion that there was no agreement to arbitrate follows perforce from its findings. Accordingly, I would affirm the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the EEOC to pursue injunctive and "make-whole" relief on behalf of Mr. Baker.

II.

A.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, which governs here, represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Where there is a valid agreement to arbitrate that covers the matter in dispute, the FAA requires federal courts to stay any ongoing judicial proceedings and compel arbitration. *See Hooters of Am., Inc.* v. *Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (citing the FAA, 9 U.S.C. §§ 3, 4).

But the mandate and policy concerns of the FAA come into play only if the claims at issue are arbitrable in the first instance, and if there is a valid agreement to arbitrate. *See Phillips*, 173 F.3d at 937-38. This court has held that a claim such as Baker's is arbitrable; the ADA does not prohibit arbitration of a claim arising under that statute. *See Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) ("The language of the [ADA] could not be any more clear in showing Congressional favor towards arbitration."); *see also Phillips*, 173 F.3d at 937. However, the question remains whether Mr. Baker and Waffle House

entered into an agreement to arbitrate that would require Mr. Baker to arbitrate any ADA claim arising from his employment at the WCWH.

Whether a contract to arbitrate exists is "an issue for judicial determination to be decided as a matter of contract." *Johnson* v. *Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (citing *AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)). In deciding this issue, we should apply "ordinary state-law principles that govern the formation of contracts." *Johnson*, 148 F.3d at 377 (quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)).

South Carolina law supports the district court's conclusion here. In recognition of the fact that Mr. Baker did not accept the offer of employment at the CWH, the district court held that "no employment agreement came into being following Baker's signing of the application form on June 23, 1994." The formation of contracts under South Carolina law "is governed by well-settled principles." *Carolina Amusement Co.* v. *Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122, 125 (1993).

> Quite simply, [a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

Id. (internal citations and quotation marks omitted).

When the manager at the Columbia Waffle House offered Mr. Baker a job, the terms of *that* offer included the provisions of the employment application, which Mr. Baker had completed in the restaurant on June 23, 1994, while the restaurant manager was sitting next to him. Those terms were part of the "bargained-for exchange" offered by the manager of the CWH.[5] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *see also Prescott* v. *Farmers Tel. Coop.*, 335 S. C. 330, 516 S.E.2d 923, 926 (1999). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement*, 437 S.E.2d at 125 (citations omitted). Without an acceptance of an offer, there can be no contract. *Id.*; *see also* Restatement (Second) of Contracts § 35 cmt. c.

Because Mr. Baker declined to accept the job offered on June 23, 1994, by the manager of the CWH, no employment agreement was formed. *Id.* Under settled legal principles, the terms of the rejected offer,

[5] Indeed, at the top of the application in large, bold, capital letters, Waffle House states the following requirement:

MUST BE COMPLETED IN THE RESTAURANT

J.A. 26. The choice of the definite article "the" is telling. Which restaurant must the application form be completed in? The answer is obvious—*the* Waffle House restaurant to which the job applicant is applying.

In Mr. Baker's case, he did just what the form required—he completed the employment application in the Columbia Waffle House—the restaurant to which he was applying when he filled out the application.

including the provisions of the employment application, did not survive the rejection of the offer. Mr. Baker's power of acceptance of *that* offer was terminated by his rejection of it. *See* Restatement (Second) of Contracts §§ 36, 38 (when offeree rejects offer, his power of acceptance is terminated).

When Mr. Baker, three weeks later, traveled to the West Columbia Waffle House and orally applied for a job there, its manager, Mr. Bradley, made Mr. Baker an offer for a job as a grill operator at $5.50 an hour. Mr. Baker accepted Mr. Bradley's offer on the spot. There is no evidence that the provisions of the June 23, 1994 employment application were adopted, or even discussed, as part of the employment agreement that came into being three weeks later at the West Columbia Waffle House. *See Player* v. *Chandler*, 299 S.C. 101, 382 S.E.2d 891, 893 (1989) (a valid and enforceable contract requires "a meeting of the minds between the parties with regard to the essential and material terms of the agreement"). Thus, there is no basis for the majority's conclusion that Mr. Baker agreed to arbitrate claims arising from his employment at the West Columbia Waffle House.[6]

B.

In its opinion, the majority simply relies on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agree-

[6] It is undisputed that when Mr. Baker spoke with Mr. Bradley about a job at the WCWH, Mr. Bradley mentioned neither arbitration nor anything else about the way disputes were settled between Waffle House and its employees.

ment to arbitrate has been formed, while ignoring the district court's factual findings.[7] The majority's holding—that the "generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him," *ante* at [7a]—creates an unprecedented rule that has disturbing implications beyond the injustice done to Mr. Baker.

Under the rule the majority creates today, the terms contained in an employment application submitted to one facility in a restaurant chain, or any other business chain, become binding on the job applicant if she is subsequently hired by another facility in the same chain. In effect, the terms contained in the employment application, including the mandatory arbitration provision, become free-floating, ready to bind the unsuspecting job applicant whenever and wherever she might obtain employment with the same chain. It is not surprising that the majority fails to cite any authority to support its conclusion. As explained above, the majority's holding is untenable under fundamental

[7] Indeed, the majority substitutes its assumptions for the district court's findings, and fails to review or analyze the district court's findings for clear error. *See* Section I.

principles of contract law.[8]

[8] In addition, I believe that even under the majority's theory—that the employment application "followed" Mr. Baker to the West Columbia Waffle House—the arbitration provision would be unenforceable.

First, the arbitration provision mandates that the employee pay one-half of the costs and expenses of arbitration, *see supra* note 1 ("The costs and expenses of the arbitration shall be borne evenly by the parties"). At least three of our sister circuits have held that a mandatory arbitration agreement that requires an employee to pay a portion of the arbitrator's fees is unenforceable under the Federal Arbitration Act. *See Shankle* v. *B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). These courts reasoned that if an employer requires an employee to agree to mandatory arbitration as a condition to obtaining or continuing employment, thereby prohibiting the employee from using the judicial forum to vindicate his rights, then the employer must provide an accessible alternative forum. *See, e.g., Shankle*, 163 F.3d at 1235. If an arbitration agreement requires the employee to pay a portion of the arbitrators' fees—which often may amount to thousands of dollars—an accessible forum is, in effect, unavailable, because of the disincentive to arbitrate created by such fees. *Id.* Under these circumstances, an employee like Mr. Baker is unlikely to pursue his statutory claims. *See Cole*, 105 F.3d at 1484 (noting that arbitration fees "are unlike anything that [employee] would have to pay to pursue his statutory claims in court"). As the Tenth Circuit reasoned, "[s]uch a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." *Shankle*, 163 F.3d at 1235 (citations omitted).

Second, the mandatory arbitration provision would be unenforceable because it is so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims. *See Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20-21 (1st Cir. 1999). In *Rosenberg*, the First Circuit inter-

The majority's rule has no temporal or geographical limits. For example, suppose a student submits an employment application to a McDonald's in North Carolina, and is offered but declines a position there. Then, months or years later, she seeks and obtains employment at a McDonald's in Maryland without submitting another written employment application. Under the majority's rule, she would be bound by the terms of the employment application submitted earlier in North Carolina.

Moreover, if a job applicant wishes to escape the stranglehold of the "generic, corporation-wide employment application," he must specify *his* "intent to limit the application to a particular location." *Ante* at [6a-7a]. The Waffle House application, however, does not request the applicant to specify which Waffle House locations he is applying for. And the application form itself clearly assumes that the job seeker is applying for a position at *the* restaurant where he obtained and completed the application. Yet the majority would nonetheless require the job applicant—rather than the corporation that drafted the terms of the employment application—to specify his intent, which is not asked for, to limit the application to a particular location. To

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preted the Supreme Court's decision in *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998), and a provision of the 1991 Civil Rights Act (which is also included in the ADA), as requiring that "there be some minimum level of notice to the employee [who is a party to a private arbitration agreement] that statutory claims are subject to arbitration". *Rosenberg*, 170 F.3d at 20-21. With its buried arbitration provision, Waffle House failed, as a matter of law, to provide such "minimum level of notice" to Mr. Baker that he was required to arbitrate his ADA claim. *See Rosenberg*, 170 F.3d at 20.

place such a duty on job applicants is patently unfair and unwarranted.

Common sense tells us that a person who physically goes to the Wal-Mart in Lewisburg, West Virginia, is applying for a job at *that* Wal-Mart, not one in Richmond, Virginia, or Charlotte, North Carolina, absent express negotiations to the contrary. He would not reasonably expect that the employment application submitted to the Lewisburg Wal-Mart would be considered an application to work in Richmond or Charlotte. The majority sets a trap for the unwary job applicant by the counterintuitive rule that it has created today.

III.

Because I agree with the district court that there was no agreement to arbitrate between Waffle House and Mr. Baker, I would affirm its ruling and permit the EEOC to pursue both injunctive and "make-whole" relief on behalf of Mr. Baker.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3 96 2739 10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Sept. 9, 1996]

COMPLAINT

JURY TRIAL DEMAND

NATURE OF THE ACTION

This is an action under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices. As alleged with greater particularity in paragraph 8 below, Eric Scott Baker, a qualified individual with a disability, was discharged by Waffle House, Inc., because of his disability.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3) and pursuant to Section 102 of the Civil Rights Act of 1991. 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the District of South Carolina, Columbia Division.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of Title I of the ADA and is expressly authorized to bring this action by Section 107(a) of the ADA, 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII, 42 U.S.C. § 2000e-5(f)(1) and (3).

4. At all relevant times, Defendant, Waffle House, Inc. (the "Employer"), has continuously been a Georgia Corporation doing business in the State of South Carolina and the City of West Columbia, and has continuously had at least 15 employees.

5. At all relevant times, Defendant Employer has continuously been an employer engaged in an industry affecting commerce under Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e-(b), (g) and (h).

6. At all relevant times, Defendant Employer has been a covered entity under Section 101(2) of the ADA, 42 U.S.C. § 12111(2).

STATEMENT OF CLAIMS

7. More than days prior to the institution of this lawsuit, Eric Scott Baker filed a charge with the Commission alleging violations of the ADA by Defendant Employer. All conditions precedent to the institution of this lawsuit have been fulfilled.

8. On or about September 5, 1994, Defendant Employer engaged in unlawful employment practices at its West Columbia, South Carolina facility, in violation of Section 102(a) of the ADA, 42 U.S.C. § 12112(a). The practices included discharging Eric Scott Baker, a qualified individual with a disability (seizure disorder), from his position as a cook because of his disability.

9. The effect of the practice complained of in paragraph 8 above has been to deprive Eric Scott Baker of equal employment opportunities and otherwise adversely affect his status as an employee because of his disability.

10. The unlawful employment practice complained of in paragraph 8 above was intentional.

11. The unlawful employment practice complained of in paragraph 8 above was done with malice or with

reckless indifference to the federally protected rights of Eric Scott Baker.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, successors, assigns, and all persons in active concert or participation with it, from discharging individuals and engaging in any other employment practice which discriminates on the basis of disability.

B. Order Defendant Employer to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant Employer to make whole Eric Scott Baker, by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to rightful-place reinstatement.

D. Order Defendant Employer to make whole Eric Scott Baker by providing compensation for past and future pecuniary losses resulting from the unlawful employment practice described in paragraph 8 above, including but not limited to job search expenses and medical expenses, in amounts to be determined at trial.

E. Order Defendant Employer to make whole Eric Scott Baker by providing compensation for past and

future nonpecuniary losses resulting from the unlawful practice complained of in paragraph 8 above, including but not limited to emotional pain, suffering, inconvenience and humiliation, in amounts to be determined at trial.

F. Order Defendant Employer to pay Eric Scott Baker punitive damages for its malicious and reckless conduct, as described in paragraph 8 above, in amounts to be determined at trial.

G. Grant such further relief as the Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

C. GREGORY STEWART
General Counsel

ROSALIND GRAY
Deputy General Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3 96 2739 10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Sept. 9, 1996]

PLAINTIFF'S RESPONSES TO STANDARD INTERROGATORIES AND STANDARD DIRECTIVES TO PRODUCE IN COMPLIANCE WITH LOCAL RULE 7.04

Plaintiff, Equal Employment Opportunity Commission (the "Commission"), files the following responses to standard interrogatories and directives to produce in compliance with Rule 7.04 of the Local Rules of Practice for the United States District Court for the District of South Carolina (hereafter "Local Rules").

RESPONSES

1. Furnish a detailed factual basis for each claim you assert. If a contract, writing or document forms the basis of any claim, quote or attach the relevant portions, state your construction thereof and the claimed breach or wrongful conduct in connection therewith.

RESPONSE: Eric Baker is a twenty-one year old male resident of Gaston, South Carolina. Baker was involved in an automobile accident in 1992. As a result of the accident, Baker now has a disability, a seizure disorder. Although his seizures are controlled by the medication Depakote, he may still infrequently experience a seizure. He has certain physical symptoms prior to having a seizure which prepare him for the possibility of the seizure, and he seeks out a place to await the seizure.

In July of 1994, Baker was asked by Lee Motlow, the District Manager for Waffle House, whether he wanted a job. Baker told Motlow about his seizures. Motlow assured Baker that there was no problem.

Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow has referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit #446 in West Columbia. Baker visited Unit #446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later. During this conversation, Baker told Bradley that he suffered from seizures.

Baker started work at Waffle House on August 10, 1994. Baker's job was to prepare food orders for customers and prepare food for later use. The Grill Operators normally work seven to eight hours per day and use the grill, toasters, waffle irons, a two isle burner, knives and other utensils.

On or about August 25, Baker suffered a seizure at home. The seizure was caused by a change in Baker's

medication. Baker called Bradley who told him to stay home and come to work the next day.

On or about August 26, a Friday, Baker went to work for his scheduled shift. Baker was to begin work at 8:00 a.m. At about 7:50 a.m., just prior to clocking in, Baker felt as though he was going to have a seizure. He went into the back room of the restaurant and sat down. Tonya Pridgen called Baker's parents to inform them of the situation. The parents came to the restaurant. Shortly after they arrived, Baker began to have the seizure. It lasted about thirty seconds. Afterward, Baker went home for the day.

Baker called his workplace that evening and spoke with the Relief Manager, Violet Sharpe. Sharpe told him to call back the next day to speak with Bradley. When Baker called the next day, Sharpe told him that Bradley was on vacation and that Bradley had told her that Baker could not return to work until he returned from vacation.

Baker spoke with Bradley on or about the afternoon of September 3, 1994. Baker told Bradley that he felt fine and wanted to return to work. Bradley told Baker that they needed to talk about it and asked Baker to come to the restaurant on the next morning.

Baker went to the Waffle House on or about September 4, 1995. He was accompanied by his parents. Baker went into the back of the restaurant with Bradley to discuss the situation. Bradley asked Baker how he felt. Baker replied that he was fine and asked when he could return to work. Bradley stated he could not let him return to work because of the seizures. When asked

the reason, Bradley, stated: "We can't have you spazzing out around the customers because it looks bad."

On or about September 12 or 13, Baker telephoned Motlow and discussed his discharge. Motlow stated that Baker should have never been told it would not be a problem to work at Waffle House with the seizures and that Baker should have never been hired.

Waffle House provided a Separation Notice to Baker. The notice stated the following as the reason for Baker's separation from employment:

> Scott was Hired As a Grill operator, Where he Was Involved With Grease & a Hot Flame. On 8/26/94 Scott Experenced (sic) A Seizure On both Days. We Were Told It Was Due to A change in medication. We Decided that For his Benefit & *Safety* at Waffle House It Would Be Best he not Work Any more.

2. Describe, by name and citation or other generally recognized identification, decisions, statutes, ordinances, acts, codes, regulations, legal principles, standards, and customs or usages, which you contend are especially applicable to this action. State which jurisdiction's law applies to each claim and why.

RESPONSE: Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a), which incorporates by reference Sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3), and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The

ADA prohibits an employer from discharging an employee because of the employee's disability. 42 U.S.C. § 12112(a).

Applicable to this action are the following decisions: *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995); *Tyndall v. National Education Centers*, 31 F.3d 209 (4th Cir. 1994); and *Sarrsycki v. United Parcel Service*, 862 F.Supp. 336 (W.D. Okla. 1994).

3. State the full names, addresses, and telephone numbers of all lay witnesses whose testimony you may use at the trial of this case and describe the special factual issues to which that testimony is expected to relate.

RESPONSE: The lay witnesses currently known to the Commission whose testimony may be used at trial include:

1. Eric Scott Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   The Commission expects Eric Scott Baker to testify regarding his employment and subsequent discharge from Defendant. He will also testify regarding his medical condition and the harm he has suffered as a result of the discharge.

2. Sylvia Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   Sylvia Baker is Eric Scott Baker's mother. The Commission expects Sylvia Baker to testify regarding the events occurring on August 26, 1994 at Defendant's West Columbia facility. Sylvia Baker will also testify regarding her son's medical condition and the harm suffered by her son as a result of his discharge by Defendant.

3. Robert G. Baker
   106 Oakdale Street
   Gaston, S.C. 29053
   Telephone: 803/926-8652

   Robert G. Baker is Eric Scott Baker's father. The Commission expects Robert G. Baker to testify regarding the events occurring on August 26, 1994 at Defendant's West Columbia facility. Robert G. Baker will also testify regarding his son's medical condition and the harm suffered by his son as a result of his discharge by Defendant.

4. Michael Bradley
   c/o Waffle House, Inc.
   P.O. Box 6450
   Norcross, GA 30091-6450
   Telephone: 404/729-5700

   The Commission expects Michael Bradley to testify regarding Eric Scott Baker's employment with Defendant, including matters regarding Baker's discharge.

5. Violet Sharpe
c/o Waffle House, Inc.
P.O. Box 6450
Norcross, GA 30091-6450
Telephone: 404/729-5700

The Commission expects Violet Sharpe to testify regarding Eric Scott Baker's employment with Defendant, including matters regarding Baker's discharge and Baker's attempt to come back to work after he suffered a seizure.

6. Lee Motlow
c/o Waffle House, Inc.
P.O. Box 6450
Norcross, GA 30091-6450
Telephone: 404/729-5700

The Commission expects Lee Motlow to testify regarding Eric Scott Baker's employment with Defendant, including his hiring and his discharge.

7. Tonya Pridgen
116 S. Carlyle St.
Gaston, SC 29053
Telephone: 803/796-7460

The Commission expects Tonya Pridgen to testify regarding Baker's employment with Defendant. Tonya Pridgen will also testify regarding conversations between Eric Scott Baker and Michael Bradley, to the extent that she was a part of those conversations.

8. Lawson Pridgen
Address unknown.

The Commission expects Lawson Pridgen to testify regarding Baker's employment with Defendant. Lawson Pridgen will also testify regarding conversations between Eric Scott Baker and Michael Bradley, to the extent that she was a part of those conversations.

9. Mary Moore
Paralegal Specialist
U.S. Equal Employment Opportunity Commission
129 West Trade Street, Suite 400
Charlotte, N.C. 28202
Telephone: 704/344-6682

The Commission expects Ms. Moore to testify regarding calculation of lost wages and benefits of Eric Scott Baker as a result of his discharge by Defendant.

10. Designated Custodian of Records for
S.C. Human Affairs Commission
2611 Forest Drive, Suite 200
Columbia, S.C. 29240
Telephone: 803/253-6336

11. Designated custodian of records for
the Charlotte District Office of the
U.S. Equal Employment Opportunity Commission
129 West Trade Street, Suite 400
Charlotte, N.C. 28202
Telephone: 704/344-6682

The custodians of records to be designated by the Commission and by the S.C. Human Affairs Commission are expected to testify regarding documents generated and obtained during the investigation of Mr. Baker's charge of employment discrimination.

The Commission reserved the right to supplement and/or amend this list of potential lay witnesses and the designations of the subject matter on which each witness may testify in accordance with the Local Rules of this district and the Federal Rules of Civil Procedure.

4. Identify by full name, address and telephone number each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert so identified, state the subject matter on which he is expected to testify, the substance of the facts and opinions to which he is expected to testify, and a summary of the grounds for each opinion.

RESPONSE: Although it is anticipated that Baker's personal physician may testify as to matters related to seizure disorders and Baker's condition, no expert witnesses have been identified by the Commission at this time. This response will be supplemented as required by the Local Rules and the Federal Rules of Civil Procedure.

5. If you contend that you have been injured or damaged, describe said injuries, damages and method of computation in detail, including but not necessarily limited to: the nature of the injury or damage; claimant's life expectancy; medical, nursing, hospital and similar expenses and the names of persons and institutions and the amount paid to and owing each; the

cost of repairs to property and names of persons making them or, if incapable of repair, the value of the property immediately before the damage and immediately afterwards; the amount of lost earnings or profits; the period for which loss is claimed, and the name of employer if applicable; the age, employment, earnings, marital status, and life expectancy of the deceased and the names, ages, and the relationship of each statutory beneficiary.

RESPONSE: The Commission brings this action on behalf of Eric Scott Baker. Based on the information currently available to the Commission, the Commission will seek damages for Mr. Baker as follows:

a. back pay in an amount sufficient to compensate Mr. Baker for the period from September 4, 1994, the date the Mr. Baker was terminated, through the date of trial, less amounts earned in mitigation;

b. prejudgment interest;

c. compensatory damages for out-of-pocket expenses, emotional distress, mental anguish and loss of self-esteem, in an amount to be determined at the time of trial;

d. punitive damages in an amount to be determined at the time of trial.

The amounts sought as compensatory and punitive damages is subject to the exclusions and limitations set forth in 42 U.S.C. § 1981a.

This response is based on information currently available to the Commission. The Commission will supple-

ment and/or amend this response when additional information is obtained, in accordance with the Local Rules and the Federal Rules of Civil Procedure.

6. State the full name, address, and telephone number of all persons or legal entities who have a subrogation interest in each claim, and state the basis and extent of said interest.

RESPONSE: All amounts recovered from Defendant Employer in this litigation will be received directly by Mr. Baker based on his charge of discrimination against Defendant Employer. Mr. Baker's address and telephone number are:

Eric Scott Baker
106 Oakdale Street
Gaston, S.C. 29053
Telephone: 803/926-8652

7. State the time you estimate it will take you to complete discovery. Explain if appropriate.

RESPONSE: 180 days.

8. As to each claim, state whether it should be tried jury or nonjury and why.

RESPONSE: The Commission's claim arises under the Americans with Disabilities Act of 1990, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a, *et al.* Pursuant to section 1981a(c) of the Civil Rights Act of 1991, the Commission is entitled to trial by jury of the ADA claim because compensatory and punitive damages are sought by the Commission on behalf of Mr. Baker. The Commission has timely requested a jury trial in this case.

9. If the plaintiff is a publicly-owned entity, or a partner, parent, subsidiary or affiliate of a publicly-owned entity, list the identity of the publicly-owned entity and its relationship to plaintiff. If there is a publicly-owned entity not a party to the case that has a significant financial interest in the outcome, identify such entity and the nature of the financial interest.

RESPONSE: Not applicable.

10. State the basis for asserting your claim in the division in which it was filed.

RESPONSE: The discriminatory actions alleged in the complaint against Defendant Employer occurred at Defendant Employer's principal place of business in West Columbia, South Carolina, within the venue of the Columbia Division of the United States District Court for the District of South Carolina.

11. Do you want a mediation conference to be scheduled in this case? If so, when?

RESPONSE: The Commission attempted unsuccessfully to conciliate with Defendant Employer on behalf of Mr. Baker prior to initiating this action. The Commission does not believe that mediation efforts would

be beneficial, and thus, does not request a mediation conference at this time.

9-4-96
DATE

Respectfully submitted,

C. GREGORY STEWART
General Counsel

ROSALIND GRAY
Deputy General Counsel

/s/ MINDY E. WEINSTEIN
MINDY E. WEINSTEIN
Regional Attorney

/s/ ROSEMARY J. FOX
ROSEMARY J. FOX
Supervisory Trial Attorney

/s/ DAVID R. TREETER
DAVID R. TREETER
Senior Trial Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
129 West Trade Street
Suite 400
Charlotte, NC 28202
(704) 344-6886

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3:96-2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Dec. 2, 1996]

AFFIDAVIT OF J. MICHAEL UPTON

I, J. Michael Upton, having been duly sworn by an officer authorized to administer oaths, deposes and states as follows:

1.

I am over twenty-one years of age and competent to testify to the matters contained herewith. This affidavit is based on my personal knowledge of the facts contained herein.

2.

I am currently employed as Vice President and General Counsel of Waffle House, Inc. ("Waffle House"), and I am familiar with the corporate structure and the rules and procedures of Waffle House. The document attached to this affidavit is a record made as a regular part of Waffle House's business activity and is kept by

Waffle House in the course of its regularly conducted business activities.

3.

Waffle House is based in Norcross, Georgia, and operates a multi-state chain of restaurants.

4.

Waffle House purchases food products, advertising and many other products and services from vendors throughout the United States.

5.

All prospective Waffle House employees are required to complete and sign a Waffle House employment application prior to being hired.

6.

Waffle House's employment application contains a provision requiring all disputes between the employee signing the application and Waffle House to be submitted to arbitration.

7.

Eric Scott Baker ("Baker") completed an application for employment with Waffle House on or about June 23, 1994.

8.

A true and correct copy of the Waffle House employment application executed by Baker is attached hereto as Exhibit "A".

9.

The claims alleged by the Equal Employment Opportunity Commission on behalf of Baker in this civil action are within the scope of potential controversies with Waffle House that Baker agreed to submit to arbitration.

FURTHER AFFIANT SAYETH NOT.

/s/ J. MICHAEL UPTON
J. MICHAEL UPTON

Sworn to and subscribed
before me this 25th day
of November, 1996.

/s/ DEBORAH M. MURPHY
Notary Public

My commission expires:
Notary Public, DeKolb County, Georgia
My Commission Expires Jan. 23, 1998
[seal omitted]

WAFFLE HOUSE®

AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT ®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT

(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT	
Work Location _____	Rate _____
Position _____	Date _____

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Date JUNE 23, 1994

Social Security No. 251-75-4659

Name BAKER (Last) ERIC (First) SCOTT (Middle) Telephone No. (803) 724-4777

Present Address 106 OAKDALE (No. / Street) STR. GASTON (City) SC (State) 29053 (Zip)

Next of kin to be notified in event of emergency: Name: ROBERT G OR SYLVIA G BAKER

Relationship: FATHER/MOTHER Address: 106 OAKDALE STR. GASTON SC 29053 Telephone No. (803) 724-4777

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 90-202 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old. The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reasons. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: WHITE Birthdate: 10/27/74 Sex: M ✓ F ____ Height: 5 ft. 8 in. Weight 138 lbs.

Marital Status: Single ✓ Engaged ____ Married ____ Separated ____ Divorced ____ Widowed ____

Number of dependents including yourself Ø Are you a citizen of the U.S.A.? YES

Have you ever been bonded? NO If yes, on what jobs? ____

Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full: ____

Are you now or have you been a user of or addicted to: Drugs NO Alcohol to excess ____

What kind of car do you drive? Make BUICK Model SKYHAWK Year 1985

Will you use your car to get to work? YES

If not, what method of transportation will you use to get to work? ____

Position(s) applied for ____ Rate of pay expected $ ____ per/hr. $ ____ per/wk.

Would you work Full-Time ✓ Part-Time ____ Specify days and hours if part-time ____

Were you previously employed by Waffle House? NO If yes, when and where? ____

List any friends or relatives working for us and where NONE (Names)

If your application is considered favorably, on what dates will you be available for work? TWO WEEK FROM TODAY 19 94

Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I PAN A CREW + WORK IN THE FOOD BUSINESS FOR 4 YEARS.

Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully: ____

Can you lift 20 lbs to shoulder height? YES

Are you able to remain standing on your feet for a full 7-10 hour shift? YES

Are you able to sweep, mop, etc.? YES

MILITARY SERVICE: Are you a veteran? NO If yes, dates of service: ____ Branch: ____

Rank attained: ____ Date/Type of dismissal: ____

Are you a member of any Reserve organization or National Guard? NO

BEST AVAILABLE COPY

• IMPORTANT •

NOTICE TO APPLICANT

Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day.

1. Drivers license with your picture AND
2. A. U.S. social security card OR an original or certified copy of your birth certificate.

If you don't have any of the above, please tell the unit manager and he will tell you what other documents are acceptable for completing the I-9 form.

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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FORM # 4002

EXHIBIT A

PERSONAL REFERENCES (Not former Employers or Relatives)

Name and Occupation	Address	Phone Number
Keith Gunter	P.O. Box 201 Gaston SC 29053	791-1601
Dennis Adams	104 Oakdale Dr Gaston SC 29053	939-0747
NITA Bridges	P.O.Box 1416 Gaston SC 29053	776-1360

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	List Diploma or Degree
High	Swansea High School	90 - 94	Business	1 2 3 (4)	☑ Yes ☐ No		Diploma
College				1 2 3 4	☐ Yes ☐ No		
Other (Specify)				1 2 3 4	☐ Yes ☐ No		

WORK EXPERIENCE (List below last three employers, starting with last one first)

I

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Little Caesars Restaurant	2	94	-	-	P.I.C. Run crew; handle money, prep, clean, etc.	4.25	5.50	Still employed.	PATTI: PHONE# 791-1704
REFERENCE CHECKED BY:									

II

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Winn-Dixie	6	93	7	94	Deli. Asst mgr. Run CREW, prep clean, etc.	4.35	4.35	School.	Beenee PHONE# -
REFERENCE CHECKED BY:									

III

NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
Bi-Lo	12	92	5	93	Bagger. Stocker	4.25	4.35	Manager. Medical - work-rm.	Seth Weddle PHONE#
REFERENCE CHECKED BY:									

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 94

Signature of Applicant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CIVIL ACTION No. 3:96 2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

AFFIDAVIT OF ERIC SCOTT BAKER

Eric Scott Baker being first duly sworn, on oath, deposes and states as follows:

1. I am a graduate of Swansea High School in Swansea, South Carolina, and I have had no post-secondary education or formal training.

2. On June 23, 1994, I went to the Waffle House facility at I-26 and S.C. 302, in Columbia, South Carolina, and completed a Waffle House Application for Employment. I was twenty years of age at that time.

3. I completed the Waffle House Application for Employment while I was sitting in a booth at the restaurant.

4. A manager was sitting with me while I completed the application form.

5. The manager asked me questions regarding my transportation to work and the expected wage rate.

6. I was given a math test while I was at the restaurant, and the manger graded the test.

7. The manager did not point out any arbitration provision on the application form.

8. I believed that I was completing and submitting a standard application form; I did not notice or read on the application form any provision for arbitration.

9. The manager did not mention arbitration, nor did he mention anything about the way disputes were settled between the company and employees.

10. The manager hired me; however, I subsequently declined the job offer.

11. A few weeks after the job offer, I spoke with Mike Bradley, manager of another nearby Waffle House, Unit #446 in West Columbia, South Carolina, and Bradley offered me a job at Unit #446, which I accepted.

12. I did not have to reapply or take another math test when I was offered the job at Unit #446.

13. Mike Bradley did not mention arbitration, nor did he mention anything about the way disputes were settle between the company and employees.

14. While I worked at Unit #446, I was paid $5.50 an hour.

15. I have now been shown a copy of the application form which I submitted to Waffle House, and I have read the four lines of print at the bottom of the first page, which mention arbitration.

16. I do not understand what the arbitration provision means. Specifically, I do not understand how it relates to my charge of discrimination against Waffle House.

17. Waffle House gave me a separation notice, a true and correct copy of which is attached hereto as Exhibit A.

Further affiant sayeth not.

/s/ ERIC SCOTT BAKER
ERIC SCOTT BAKER

Subscribed and sworn to before me
this 23 day of December, 1996.

/s/ CINDY J. MUNCK
CINDY J. MUNCK
Notary Public

My commission expires: 1-10-2000